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I. INTRODUCTION

The human carnage caused by drunk drivers on our highways is a problem of staggering proportions. The cost to society has been estimated at over twenty-four billion dollars per year, but the value of human lives lost as a result of accidents caused by drunken driving remains immeasurable.[1] To compensate victims, the drunken driver himself has long been criminally and civilly responsible for the injuries he causes to others.[2] However, many victims remain uncompensated because the drunken driver often cannot satisfy a monetary judgment. This comment focuses on the civil liability of purveyors of alcoholic beverages for the damages caused by drunken drivers.

Traditionally, a purveyor of alcohol could not be held liable in negligence for injuries caused or sustained by an "able-bodied man" to whom the purveyor had furnished intoxicating beverages.[3] Once widely accepted throughout the United States, the common law rule of nonliability has become increasingly disfavored. Some states implement dramshop liability through judicial modification of the common law.[4] Other states circumvent the common law rule

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1. Glorioso, *Kelly v. Gwinnell: What It Said and Why*, TRIAL, March 1985, at 42, 45 (citing Presidential Commission on Drunk Driving, *Final Report 1* (1983)); *see also* NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, THE ECONOMIC COST TO SOCIETY OF MOTOR VEHICLE ACCIDENTS (1983).

2. For a general discussion of the criminal liability of the drunk driver, see 7A AM. JUR. 2D *Automobiles and Highway Traffic* §§ 296-310 (1980). For a general discussion of the civil liability of the drunk driver, see *id.* § 775.

3. *See* Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889). As the *Cruse* court noted:

> It was not a tort, at common law, to either sell or give intoxicating liquor to "a strong and able-bodied man," and it can be said safely that it is not anywhere laid down in the books that such act was ever held, at common law, to be culpable negligence, that would impose legal liability for damages upon the vendor or donor of such liquor.

Id. at 234, 20 N.E. at 74. However, only the following five states still take the position that there can be no civil liability for serving alcoholic beverages in the absence of a dramshop act: Arkansas, Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Maryland, Fisher v. O'Connor's, Inc., 53 Md. App. 338, 452 A.2d 1313 (1982); Nebraska, Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Nevada, Yoscovitch v. Wasson, 98 Nev. 250, 645 P.2d 975 (1982); and Wisconsin, Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979).

4. Comment, *Third Party Liability for Drunken Driving: When "One for the Road" Becomes One for the Courts*, 29 VILL. L. REV. 1119, 1138 n.86 (1984).

of nonliability by enacting dramshop civil liability statutes.[5] Currently, Montana law is undergoing change on both fronts.

The Montana Supreme Court, in *Nehring v. LaCounte*,[6] abrogated the common law rule of nonliability. By discarding the "Neanderthal approach" to causation which formerly exempted a purveyor of alcoholic beverages from liability without regard to his own negligence, the court recognized a new cause of action.[7] In the wake of *Nehring*, a special session of the Forty-Ninth Legislature enacted a dramshop act providing criteria for imposing civil liability on purveyors of alcohol for injuries and damages caused by consumers.[8] This comment examines this recent activity and attempts to discern the civil liability of purveyors, particularly tavern operators, for the damages caused by drunk drivers.

II. The Expanding View of Dramshop Liability

A. *Judicial Modification of the Common Law Rule of Nonliability*

At common law, a tavern operator was not liable for injuries caused to either third parties or to the patron himself by an intoxicated patron, even if the tavern operator's negligence in serving the alcohol contributed to the accident.[9] A restrictive causation theory buttressed this common law rule of nonliability. The courts viewed the patron's voluntary consumption of the alcohol as a superseding-intervening cause between the tavern operator's negligence and the injury-producing act.[10] Thus, the common law the-

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5. Beitman, *Dramshop Liability: An Overview of Recent Trends*, Trial, March 1985, at 38. In 23 states, at least some degree of civil liability has been imposed legislatively by enactment of dramshop statutes. *See* Ala. Code § 6-5-71 (1979); Alaska Stat. § 04.21.020 (1983); Cal. Bus. & Prof. Code § 25602.1 (West Supp. 1985); Colo. Rev. Stat. § 13-21-103 (1973); Conn. Gen. Stat. Ann. § 30-102 (West 1975); Fla. Stat. Ann. § 768.125 (West Supp. 1986); Ga. Code Ann. § 51-1-18 (1982); Ill. Ann. Stat. ch. 43, § 135 (Smith-Hurd Supp. 1985); Iowa Code Ann. § 123.92 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 17, § 2002 (1983); Mich. Stat. Ann. § 18.993 (Callaghan Supp. 1985); Minn. Stat. Ann. § 340A.801 (West Supp. 1986); N.M. Stat. Ann. § 41-11-1 (Supp. 1985); N.Y. Gen. Oblig. Laws § 11-101 (McKinney 1964 & Supp. 1986); N.C. Gen. Stat. §§ 18B-120 to -129 (1983); N.D. Cent. Code § 5-01-06 (Supp. 1985); Ohio Rev. Code Ann. § 4399.01 (Page 1982); Or. Rev. Stat. §§ 30.950 -.960 (1983); Pa. Stat. Ann. tit. 47, § 4-497 (Purdon 1969); R.I. Gen. Laws §§ 3-11-1, 3-11-2 (1976 & Supp. 1985); Utah Code Ann. § 32A-14-1 (Supp. 1985); Vt. Stat. Ann. tit. 7, § 501 (1972); Wyo. Stat. § 12-8-301 (Supp. 1985). Another 15 states and the District of Columbia have expanded the common law to provide for civil liability in dramshop cases.

6. ___ Mont. ___, 712 P.2d 1329 (1986).

7. *Id.* at ___, 712 P.2d at 1335.

8. *See infra* text accompanying notes 95-100.

9. For a discussion of the common law rule barring recovery against a purveyor of alcoholic beverages, see *infra* notes 10-11 and accompanying text.

10. *See, e.g.*, Ontiveros v. Borak, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983).

ory identified the consumption of the alcohol, not the sale, as the proximate cause of the tortious injury.[11]

Contrary to this common law rule of nonliability, federal district courts in Montana implicitly recognized a negligence cause of action in favor of an injured third party against a tavern operator who sold alcohol in violation of the Montana's liquor control statutes.[12] In *Deeds v. United States*,[13] a federal district court imposed liability on an Air Force N.C.O. club which served alcohol to an intoxicated minor serviceman who was subsequently involved in an automobile accident in which the plaintiff, a seventeen year old girl, was injured. The Honorable William J. Jameson held that, under the particular circumstances, "the sale and serving of liquor . . . in violation of Montana law was a proximate cause of the accident and the resulting injuries to plaintiff."[14] Another Montana federal district court reached a similar conclusion in *Johnson v. United States*.[15] In *Johnson*, the court found that violations of "closing hours" statutes and Air Force regulations which prohibited tavern operators from serving alcohol after closing hours constituted negligence per se and a proximate cause of the plaintiff's injuries.[16]

In two 1978 cases, plaintiffs who were injured after being served in violation of the liquor control statutes brought suit for damages against the tavern operators.[17] In both *Swartzenberger v. Billings Labor Temple Association*[18] and *Folda v. City of Bozeman*,[19] the Montana Supreme Court denied recovery because of the plaintiffs' contributory negligence rather than because no cause of action existed.[20] Presumably, an injured third person free of

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11. Nevin v. Carlasco, 139 Mont. 512, 515-16, 365 P.2d 637, 639 (1961); Runge v. Watts, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979). This theory of proximate cause was the recognized rule of other jurisdictions as well. *See, e.g.*, Collier v. Stamatis, 63 Ariz. 285, 290, 162 P.2d 125, 127 (1945) ("The principle is epitomized in the truism that there may be sales without intoxication, but no intoxication without drinking."); State ex rel. Joyce v. Hatfield, 197 Md. 249, 254, 78 A.2d 754, 756 (1951) ("Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor.").

12. Johnson v. United States, 496 F. Supp. 597 (1980) (bifurcated on the issue of damages, see 510 F. Supp. 1039 (1981)); Deeds v. United States, 306 F. Supp. 348 (1969).

13. 306 F. Supp. 348.

14. *Id.* at 361.

15. 496 F. Supp. 597.

16. *Id.* at 603-04.

17. *See* Swartzenberger v. Billings Labor Temple, 179 Mont. 145, 586 P.2d 712 (1978); Folda v. City of Bozeman, 177 Mont. 537, 582 P.2d 767 (1978).

18. 179 Mont. 145, 586 P.2d 712.

19. 177 Mont. 537, 582 P.2d 767.

20. *Swartzenberger*, 179 Mont. at 152, 586 P.2d at 716; *Folda*, 177 Mont. at 545, 582 P.2d at 772.

contributory negligence may have prevailed.

The court subsequently foreclosed the possibility of dramshop liability based on Montana's liquor control statutes. In *Runge v. Watts*,[21] the Montana Supreme Court refused to follow the lead of the federal court in *Deeds* and held that no cause of action existed unless the patron to whom the tavern operator furnished alcohol was "in such a state of helplessness . . . as to be deprived of willpower or responsibility for his behavior."[22] The *Runge* "helplessness" standard made it unlikely that a plaintiff in Montana would recover on any theory of dramshop liability.

The Montana Supreme Court did not consider dramshop liability again until *Nehring*,[23] when it reexamined the reasoning behind the common law rule and concluded that the "literal application of the common law rule has become unjust."[24] The court abandoned the common law rule of nonliability and held that tavern operators owe a duty, based on Montana's liquor control statutes and the common law, to refrain from serving intoxicated persons and minors.[25]

B. *Nehring v. Lacounte: The Court's New Position*

1. *Facts and Procedure*

The accident which prompted the *Nehring* lawsuit occurred during the early morning hours of September 20, 1980 in North Dakota, about three miles west of Williston.[26] Michael Bottensek drove the wrong way on a four-lane divided highway and struck head on an oncoming vehicle driven by Harold Nehring.[27] Nehring and two passengers in Bottensek's vehicle were killed.[28]

Bottensek and several friends had commenced celebrating a birthday party in Williston on the afternoon of September 19, 1980.[29] Bottensek consumed four beers prior to departing for Lenny's Bar in Bainville, Montana, about 35 miles from his home in North Dakota.[30] On the way, Bottensek drank a couple more beers. Bottensek arrived at Lenny's around 10:00 p.m. and he

21. 180 Mont. 91, 589 P.2d 145 (1979).
22. *Id.* at 93, 589 P.2d at 146-47 (quoting 45 AM. JUR. 2D, *Intoxicating Liquors* § 554 (1969)).
23. ___ Mont. ___, 712 P.2d 1329.
24. *Id.* at ___, 712 P.2d at 1334.
25. *Id.*
26. *Id.* at ___, 712 P.2d at 1331.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*

drank eight more beers during the next two or three hours.[31]

The parties disputed the evidence of Bottensek's intoxication. According to the LaCountes, the owners and operators of Lenny's Bar, and one of their employees, Bottensek never appeared intoxicated.[32] Bottensek testified that he was drunk when he ordered his last beer and that he left the tavern at about 1:00 a.m. because of his intoxication.[33] He and his brother waited in the car until their companions left the bar at closing time an hour later. Just before leaving, Bottensek's friends purchased a fifth of lime vodka and a case of beer.[34] The accident occurred about an hour after they left the tavern.[35] At the time of the accident, Bottensek's blood alcohol level was 0.20.[36]

The plaintiffs, Nehring's widow and heir, the personal representative of his estate, and his automobile insurer, brought suit against the LaCountes.[37] The suit alleged that the LaCountes negligently, and in violation of statute, sold alcohol to Bottensek when he was intoxicated and, therefore, caused the accident that resulted in Nehring's death.[38] The trial court granted the tavern operators' motion for summary judgment based upon the Montana law enunciated in *Runge v. Watts*, that a tavern operator is liable only if the customer served was in a "helpless" condition.[39] The plaintiffs appealed the case to the Montana Supreme Court.

2. *The Court's Holding*

A unique characteristic of the common law is its dynamic nature, which permits courts to modify the law when changed conditions and circumstances render its application unjust. *Nehring* provided the court with a vehicle for reexamining the rationale for the common law rule of nonliability in light of the widely publicized concern about the escalated occurrence of alcohol-related traffic accidents.[40] The court determined that a drunken driver cre-

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31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* 0.20 percent blood alcohol content is two times the point at which the law prohibits driving. *See* MONT. CODE ANN. § 61-8-401(1)(a) (1985).
37. *Nehring*, ___ Mont. at ___, 712 P.2d at 1331.
38. *Id.* at ___, 712 P.2d at 1331-32.
39. *Id.* at ___, 712 P.2d at 1332; *see supra* text accompanying note 22.
40. Of 194 fatal automobile accidents in Montana last year, 105 involved alcohol. Accident Statistics for Montana 1985, available from the Montana Highway Patrol. The Montana statistics additionally show that over four thousand drivers were involved in automobile accidents in which alcohol was a factor.

ates a more unreasonable risk of harm under today's conditions than in the past.[41] Such conditions include the regularity of automobile travel to and from taverns and the frequent accidents which result from drinking and driving.[42] The Montana Supreme Court concluded that current conditions render unjust a literal application of the common law rule.[43] Proceeding on that premise, the court abrogated the common law rule of nonliability and unanimously approved a theory of dramshop liability based on violation of the liquor control statutes.[44]

The relevant liquor control statutes[45] make it unlawful for any purveyor to furnish alcoholic beverages to either an intoxicated person or a minor.[46] However, violation of the liquor control statutes is not negligence per se because the legislature intended the statutes to protect the people of the state generally and the interests of the state rather than to protect against any particular kind of injury or provide a civil remedy.[47] "Where the statute does not provide for civil liability, the decision to adopt the statute as defining a standard is a judicial one."[48] The court judicially adopted the liquor control statutes as a standard against which negligence or

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41. *Id.* at ____, 712 P.2d at 1334.

42. *Id.* (quoting Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 8-9 (1959)). *Rappaport* is widely acknowledged as the seminal case allowing recovery from a commercial purveyor under an ordinary negligence theory. The following paragraph from Judge Prather's dissent in Meade v. Freeman, 93 Idaho 389, 462 P.2d 54 (1969), is particularly insightful:

> When most people walked and few had horses or carriages . . . it may have been that the common law rule of non-liability arising from the sale of liquor to an intoxicated person was satisfactory. But the situation then and the problem in today's society of the imbiber going upon the public highways and operating a machine that requires quick response of mind and muscle and capable of producing mass death and destruction are vastly different.

Id. at 400, 462 P.2d at 65.

43. *Nehring*, ____ Mont. at ____, 712 P.2d at 1334.

44. *Id.*

45. MONT. CODE ANN. §§ 16-3-301 and 16-6-304 (1985).

46. *See* MONT. CODE ANN. § 16-3-301 (1985) which states in pertinent part:

> (2) It shall be unlawful for any licensee, his or her employee or employees, or any other person to sell, deliver, or give away or cause or permit to be sold, delivered, or given away any alcoholic beverage to:
>
> (a) any person under 19 years of age;
>
> (b) any intoxicated person or any person actually, apparently, or obviously intoxicated.

See also MONT. CODE ANN.] 16-]6-304 (1985) which states: "(1) No store manager, retail licensee, or any employee of a store manager or retail licensee may sell any alcoholic beverage to a person apparently under the influence of an alcoholic beverage. (2) No person may give an alcoholic beverage to a person apparently under the influence of alcohol."

47. *Nehring*, ____ Mont. at ____, 712 P.2d at 1333.

48. *Id.* at ____, 712 P.2d at 1333-34.

due care can be measured.[49] Accordingly, the tavern operator's duty includes a duty to comply with the statutory prohibition against serving alcohol to an intoxicated person or a minor. A breach of that duty, therefore, constitutes evidence of negligence.[50]

The Montana Supreme Court denounced the causation theory which designates the act of consuming an intoxicating beverage, rather than the act of furnishing it, to be the proximate cause of any subsequent injury, and labeled it a "Neanderthal approach."[51] Substituting the common law rule of foreseeability for this causation theory, the court found that a tavern operator must anticipate the intervening negligent conduct of others. "[I]f an intervening cause is one which might be reasonably foreseen as probable or is one which the defendant might reasonably anticipate under the circumstances, that cause will not cut off the defendant's liability."[52] The court concluded "that consumption of the alcoholic beverages served, subsequent driving, and the likelihood of an injury-producing accident are foreseeable intervening acts which do not relieve the tavern operator of liability for negligence."[53] The duty imposed on tavern operators in *Nehring*, therefore, is a broad one based on both statutory and common law.

3. *Analysis of the Court's Decision*

The Montana Supreme Court addressed *Nehring* at a time of heightened public sensitivity to the societal costs associated with drunk driving. At least 38 states and the District of Columbia have some form of dramshop liability.[54] The recent expansion of dramshop liability has taken place predominantly through the development of the common law.[55] In view of this trend, the court predictably abrogated the common law rule of dramshop nonliability.

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49. *Id.* at ____, 712 P.2d at 1334.

50. *Id.*

51. *Id.* at ____, 712 P.2d at 1335.

52. *Id.* at ____, 712 P.2d at 1334 (citing *Deeds*, 306 F. Supp. at 361 and Reino v. Montana Mineral Land Development Co., 38 Mont. 291, 296, 99 P. 853, 855 (1909)). Overruling *Runge*, the court rejected the theory of superseding-intervening cause (the drinking of the alcohol served), the primary basis for the rule of nonliability, reasoning that the "Neanderthal approach" to causation insulates a purveyor of alcohol from liability regardless of whether he is negligent. *Nehring*, ____ Mont. at ____, 712 P.2d at 1335.

53. *Id.*

54. *See supra* notes 3-5 and the accompanying text.

55. Beitman, *supra* note 5 at 38 (quoting Corrigan v. United States, 595 F. Supp. 1047 (E.D. Va. 1984). "The court in *Corrigan v. United States* expressed the view of most courts nationally when it stated that due to 'the increased speed and power of automobiles, the greater likelihood that patrons will drive after leaving a bar, and the staggering injuries and costs to society of alcohol-related crashes in the past decade . . . tavern owners should be aware of the dangers of serving drinks . . . to intoxicated patrons.' "

While this change of the common law fell within its powers,[56] the court need not have exercised its power. By doing so, it set the stage for litigation of numerous complex issues which remain unresolved.

Questions survive the court's decision in *Nehring* because the facts and posture of that case limited the court. The unresolved issues highlighted in this comment are (1) the scope of a tavern operator's duty, (2) the potential liability of other commercial and social purveyors of alcoholic beverages, (3) the limitations on dramshop liability relevant to causation, and (4) the application of comparative negligence principles to dramshop actions.

a. *The Scope of a Tavern Operator's Duty*

In *Nehring*, the court held that a tavern operator has a duty to refrain from serving intoxicated persons in violation of Montana's liquor control statutes.[57] However, the court failed to clarify what conduct violates these statutes in the dramshop context. This creates a two-fold problem for tavern operators who seek protection. The first is a definitional problem. If a tavern operator sells to an intoxicated patron, that tavern operator violates the law, but the liquor control statutes fail to define "intoxicated."[58] Furthermore, the *Nehring* decision gives the tavern operator little concrete guidance for defining "intoxicated" because the court did not consider the facts relating to Bottensek's degree of actual, apparent or obvious intoxication.[59]

The second problem involves a tavern operator's perception of his patron's sobriety. Uncertainty shadows whether the court intended to require a tavern operator only to exercise reasonable care not to serve an intoxicated person or whether a tavern operator must actively police the sobriety of his patrons. A review of the relevant law of other jurisdictions discloses a variety of standards for ascertaining a patron's degree of intoxication within the meaning of the liquor control statutes. The usual criteria, ranging from the least onerous to the most burdensome, require a tavern operator to determine whether: (1) a patron is so intoxicated as to be deprived of willpower or responsibility for his actions;[60] (2) a pa-

56. MONT. CODE ANN. § 1-3-201 (1985) *quoted in Nehring*, ___ Mont. at ___, 712 P.2d at 1334. MONT. CODE ANN. § 1-3-201 states: "When the reasons of a rule cease, so should the rule itself."

57. *Nehring*, ___ Mont. at ___, 712 P.2d at 1334.

58. MONT. CODE ANN. § 16-1-106 (1985).

59. *Nehring*, ___ Mont. at ___, 712 P.2d at 1336.

60. *See, e.g.*, Wilson v. Steinbach, 98 Wash. 2d 434, 656 P.2d 1030 (1982); Halvorson v.

tron is visibly intoxicated;[61] (3) a patron's intoxication is apparent to a reasonable person;[62] and (4) a patron is legally intoxicated.[63]

The deprivation of willpower or responsibility criterion closely parallels the term "helplessness" which implies a far stricter requirement than the language of the liquor control statutes.[64] However, compliance with the liquor control statutes, specifically the statutory prohibition on serving intoxicated persons, suggests that

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Birchfield Boiler, Inc., 76 Wash. 2d 759, 485 P.2d 897 (1969) (adopting common law rule of dramshop nonliability, but recognizing exceptions for obviously intoxicated persons, persons in a state of helplessness or persons in a special relationship to the purveyor of the intoxicants); *see also Runge*, 180 Mont. at 93, 589 P.2d at 146-47 (quoting 45 AM. JUR. 2D, *Intoxicating Liquors* § 554 (1969)).

61. *See* Comment, *One More for the Road: Civil Liability of Licensees and Social Hosts for Furnishing Alcoholic Beverages to Minors*, 59 B.U.L. Rev. 725 (1979) for a discussion of the inadequacies of the obviously or visibly intoxicated standard. *Id.* at 734-38. The point of "obvious intoxication" usually exceeds the level of legal intoxication. *Id.* at 736. Thus, while the obviously intoxicated patron is one who is under the influence of alcohol, the converse is not necessarily true. *Id.* The obviously intoxicated standard is consequently inadequate because the patron is a danger behind the wheel of an automobile before he becomes intoxicated. *Id.* at 738.

An additional problem with the visibly intoxicated standard is whether visible intoxication can be established by evidence of the patron's blood alcohol content or evidence of facts not relating to outward manifestations of intoxication. In Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977), the court permitted evidence of factors other than outward manifestations. *Id.* at 243, 566 P.2d at 896. For example, the court allowed evidence of the number of drinks served and expert testimony that a woman of the patron's weight having a blood alcohol content of 0.24 would probably show outward symptoms of intoxication. *Id. Contra Wilson*, 98 Wash. 2d at 434, 656 P.2d at 1033 (sobriety is to be judged by way a person appears to those around him, and not by what a subsequent blood alcohol test reveals).

62. This test goes beyond a patron's outward manifestations of intoxication to encompass those patrons who can consume large quantities of alcohol, becoming impaired for purposes of driving, yet exhibiting no outward symptoms of intoxication. For example, under the facts of *Campbell*, 279 Or. 237, 566 P.2d 893, a reasonable tavern operator could conclude that a small woman who consumed eight beers in a two and one-half hour period was intoxicated. Numerous studies have been done on the effect of alcohol on the human body, and charts correlating the number of drinks, body weight, and blood alcohol content have recently received wide publication in an attempt to alert individuals to the amount of alcohol they can safely consume. *See* Comment, *supra* note 61, at 736-38. Thus, correlating the number of drinks served to a patron over a period of time with the patron's estimated body weight gives the tavern operator a rough estimate of the patron's blood alcohol content and could serve as a tool in ascertaining if a heavy drinker has reached a point of intoxication which could impair his ability to drive and subject the tavern operator to potential civil liability.

In addition to the quantity of alcohol consumed, other indicators which would make it apparent to a reasonable tavern operator that one to whom he is serving alcohol is intoxicated are those outward manifestations relevant to an obviously intoxicated standard, such as physical appearance, unruliness, argumentativeness, and excessively loud speech.

63. A standard of legal intoxication as set forth in the drunk driving statutes would place an impossible burden on the tavern operator because legal intoxication usually occurs before there are outward manifestations of intoxication. *See supra* note 61. Thus, a standard of legal intoxication essentially imposes strict liability on the tavern operator.

64. *Nehring*, ___ Mont. at ___, 712 P.2d at 1335.

more is required of a tavern operator than waiting until a patron is visibly intoxicated before refusing to serve him. Legal intoxication per se (blood/alcohol concentration of 0.10%) usually occurs before intoxication is visible.[65] Therefore, application of the second standard, visibly intoxicated, would be inconsistent with the underlying purpose of keeping drunk drivers off the roads. The "legally intoxicated" standard appears contrary to the court's reasoning since it presumably did not contemplate a standard of legal intoxication which would be tantamount to strict liability.[66]

While the Montana Supreme Court in *Nehring* did not expressly identify which criterion it adopted for determining intoxication, the standard that intoxication be apparent to a reasonable person comports most closely with the other principles of negligence relied on by the court. For example, the duty to foresee the negligent drunk driving of a patron is based on the common law reasonable person standard.[67] Under these standards, knowledge that a patron has consumed an excessive amount of alcohol during a short period of time could require the tavern operator to stop serving alcohol to that patron, even if he is not visibly intoxicated. The tavern operator might also be charged with constructive knowledge of both his patron's consumption and his employees' actions. This places a tavern operator in a difficult position because a tavern operator cannot always monitor consumption, especially if drinks are dispensed by the pitcher or if the patron paying for the alcohol is not the same patron consuming it. Whether a tavern operator has complied with the liquor control statutes, therefore, is a fact-specific issue which will be hammered out on a case-by-case basis.

b. *Extending Liability to Other Commercial and Social Purveyors of Alcohol Under the Principles of Nehring*

Other commercial purveyors of alcoholic beverages, such as state liquor stores, private liquor stores and grocery stores, also may be liable under the same principles that govern tavern operator liability. The liquor control statutes subject other commercial purveyors to the same statutory scheme.[68] Thus, a duty derived

65. *See supra* note 61.

66. *See supra* note 63.

67. *See supra* text accompanying notes 52-53.

68. MONT. CODE ANN. § 16-1-101 to 16-6-314 (1985). Chapters 1 through 6 of Title 16 constitute the "Montana Alcoholic Beverage Code." Entire control over the manufacture, sale, and distribution of liquor within the state of Montana is maintained according to these statutes.

from the liquor control statutes should apply to other commercial purveyors as well. While it may be argued that a commercial purveyor who sells alcohol for off-site consumption has a diminished ability to foresee the injury, a sale to an intoxicated person or a minor still constitutes a statutory violation and would be evidence of negligence under the *Nehring* analysis. However, in the case of a liquor store or grocery store purveyor, it may be more difficult to prove a causal connection between the sale and any subsequent injury.

In *Nehring*, the Montana Supreme Court did not determine the civil liability of a social host. However, the court did distinguish *Runge* which concerned the liability of a social host who furnished alcohol to a minor.[69] The court in *Runge* indicated that it would not impose liability on a social purveyor when the legislature had yet to extend liability to commercial purveyors through dramshop legislation.[70] Since the court, not the legislature, ultimately extended dramshop liability to tavern operators, the court may have something similar in mind for social hosts. Significantly, the Montana statutes upon which the court relied in *Nehring*, prohibit not just licensees, but "any other person," from furnishing alcohol to an intoxicated person or a minor.[71] An analysis of *Nehring* suggests that the Montana Supreme Court would react favorably to a cause of action arising out of the theory of social host liability. This conclusion appears consistent with protecting the public from the unreasonable risk of harm associated with the negligent serving of alcoholic beverages.[72]

The issue of social host liability, however, raises additional policy considerations.[73] Unlike a tavern operator, a social host cannot pass along to his guests the costs of obtaining insurance to protect himself from liability. If insured against this risk, a social host will likely have less insurance than a tavern operator, a businessman who can purchase insurance specifically tailored for his needs and for whom it is an expense of doing business. The financial bur-

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69. *Nehring*, ___ Mont. at ___, 712 P.2d at 1335.
70. *Runge*, 180 Mont. 94, 589 P.2d at 147.
71. *See* MONT. CODE ANN. § 16-3-301 (1985) which states:

(2) It shall be unlawful for any licensee, his or her employee or employees, *or any other person* to sell, deliver, or give away or cause or permit to be sold, delivered, or given away any alcoholic beverage to:

(a) any person under 19 years of age;

(b) any intoxicated person or any person actually, apparently, or obviously intoxicated.

(emphasis added).

72. *Nehring*, ___ Mont. at ___, 712 P.2d at 1334.
73. *Runge*, 180 Mont. at 94, 589 P.2d at 147.

den of liability protection for a social host exceeds that of a tavern operator. In addition, a tavern operator frequently enjoys a better position for observing his patrons and monitoring their level of intoxication; a tavern operator is more likely to communicate with a patron each time he purchases another drink.[74]

Notwithstanding the foreseeable difficulties and the financial burden of social host liability, the court or legislature, when faced with this issue, may conclude that the public interest in preventing alcohol-related traffic accidents outweighs these considerations. If public policy justifies the imposition of liability on a social host, the court may define the standard of care for a social host less restrictively than that for a tavern operator. Holding a social host to a lower standard of care than one who sells alcohol for profit would provide some protection to the public yet take into account the relevant policy considerations. The possibility of social purveyor liability threatens to make a social drink a perilous proposition.

c. *A Break in the Chain of Causation*

If an injured person demonstrates that a tavern operator served an intoxicated person and is therefore negligent, the injured person must then demonstrate that the tavern operator's negligence caused the accident.[75] A tavern operator may use superseding-intervening cause as a defense. While the court based its abrogation of dramshop nonliability in part on its rejection of the underlying causation theory of the common law rule, this defense remains available. By removing the special protection afforded tavern operators, the *Nehring* court rendered dramshop liability a subject for regular tort principles of negligence, including the requirement that the plaintiff establish causation.[76]

In *Nehring*, the court analyzed the superseding-intervening cause question solely in terms of automobile negligence and found it reasonably foreseeable that an intoxicated dramshop patron would leave the tavern in a car and be involved in an accident.[77] Bound by the facts of *Nehring*, the court did not speculate about the liability of a tavern operator in the event that a patron other-

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74. *Id.*

75. *See* Comment, *Tort Liability for Serving Alcohol: An Expanding Doctrine*, 46 MONT. L. REV. 381 (1985). "In any negligence case, the plaintiff must establish certain elements: (1) that the defendant owed a duty recognized in law to the plaintiff, (2) that she breached the duty, (3) *that the breach was the cause of the plaintiff's injury* and (4) that the plaintiff was damaged." *Id.* at 382 (emphasis added).

76. *Nehring*, ___ Mont. at ___, 712 P.2d at 1335.

77. *Id.*

wise injures another or himself. Unlike driving an automobile, other less foreseeable negligent acts of an intoxicated dramshop patron may not satisfy the requisite causal connection to result in tavern operator liability.[78] However, a tavern operator, no longer protected as a matter of law by the common law rule of nonliability, now faces the prospect of case-by-case litigation of all claims because the issue of superseding-intervening cause is a question of fact. Until these cases reach the courts, the extent of a tavern operator's liability will remain unclear outside of the automobile setting.

d. *The Impact of Comparative Negligence on Dramshop Actions*

Although the court focused on liability to injured third parties in *Nehring*, the same principles govern a tavern operator's liability to injured patrons. In *Bissett v. DMI, Inc.*,[79] the plaintiff, eighteen year old Zena Bissett, spent an evening drinking in several bars in Billings, Montana.[80] On her way home, Bissett drove off an overpass and sustained serious injuries.[81] Bissett sought recovery for her injuries from the taverns which she patronized on the night of the accident.[82] The Montana Supreme Court, applying the principles of *Nehring*, held that the tavern operators could be liable for Bissett's injuries notwithstanding that she was a patron as opposed to an innocent third party.[83] The court reasoned that Bissett's acts of consuming the alcohol served to her by the tavern operators and subsequent involvement in an injury-producing accident were reasonably foreseeable events which could expose the tavern operators to liability for negligence.[84]

When an intoxicated patron or a minor, served in violation of the law, is the injured party, the focal point of the controversy will likely be the doctrine of comparative negligence. Under this doctrine, a plaintiff cannot recover against a defendant if the plaintiff's negligence exceeds that of the defendant.[85] Comparative neg-

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78. Would a tavern operator be liable for injuries sustained by an intoxicated patron who, upon exiting the bar on foot transformed himself into an intoxicated pedestrian, and negligently walked into the path of an oncoming car? Alternately, consider the case of an intoxicated patron who, after leaving the bar, negligently shoots another person with a gun.

79. ___ Mont. ___, 717 P.2d 545 (1986).

80. *Id.* at ___, 717 P.2d at 546.

81. *Id.*

82. *Id.*

83. *Id.* at ___, 717 P.2d at 547.

84. *Id.* at ___, 717 P.2d at 548.

85. *See* MONT. CODE ANN. §§ 27-1-701, -702 (1985); *see also* Derenberger v. Lutey, ___ Mont. ___, ___, 674 P.2d 485, 487 (1983).

ligence, therefore, may undermine an injured patron's cause of action and provide a loophole through which a tavern operator may avoid liability. A tavern operator could raise the defense of comparative negligence, arguing that the patron failed to exercise reasonable care for his own safety if he drank past the point of intoxication and then suffered injuries as a result of his intoxication.[86] "It is difficult . . . to contemplate a fact situation where the drunk-driver plaintiff would not be more responsible for his or her own injuries than the tavern that served the intoxicating beverages."[87] While not providing the all-encompassing protection of nonliability, comparative negligence could, in many cases, negate a patron's cause of action against the tavern operator.

C. *Legislative Response*

The Montana Legislature, representative of both common and special interests, composed of persons of diverse backgrounds, education, and experience, and capable of eliciting public testimony, is better suited than the Montana Supreme Court to reconcile the important issues raised by dramshop liability. The need to reconcile competing interests demands legislative intervention. The competing interests include: (1) deterrence of drunken driving; (2) reluctance to constrain social and business relations; (3) compensation for injured parties; and (4) financial burdening of the parties held liable. Achieving a justifiable balance between those interests requires the legislature to develop a coherent definition of dramshop liability based upon notions of fairness and equity.

1. *Legislative Activity Prior to Nehring v. LaCounte*

In 1979, less than one month after the *Runge* decision impliedly invited the legislature to enact a dramshop act,[88] Representatives Huennckens and Vincent introduced dramshop legislation into the House of Representatives.[89] The bill, a "broad dramshop" act, presumably would have granted a cause of action to any party injured, either by the intoxicated person or by reason of his own intoxication.[90] The House of Representatives Judiciary

86. *Compare Swartzenberger*, 179 Mont. 145, 586 P.2d 712; *Folda*, 177 Mont. 537, 582 P.2d 767. Since the decisions in *Swartzenberger* and *Folda*, Montana has replaced contributory negligence with the doctrine of comparative negligence.

87. *Bissett*, ___ Mont. at ___, 717 P.2d at 550 (Morrison, J., concurring and dissenting).

88. *Runge*, 180 Mont. at 94, 589 P.2d at 147.

89. H.B. 777, 46th Leg., (1979).

90. H.B. 777 stated:

Committee, after a hearing in which it considered the merits of the bill, recommended "do not pass."[91] The House of Representatives adopted the committee's recommendation.

Six years later, the Forty-Ninth Legislature entertained an "anti-dramshop" act, introduced in the House of Representatives.[92] The bill, as originally proposed, would have exempted any "person or entity" who provided alcohol to anyone under any circumstances from civil liability. The House amended the bill and nullified the exemption for purveyors who provide alcohol to minors in violation of the liquor control statutes or the statute prohibiting unlawful transactions with minors.[93] As amended, the bill could have had the effect of creating civil liability for violation of those statutes. The amended bill passed in the House but received an unfavorable recommendation from the Senate Business and Industry Committee. The Senate followed the committee's

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A BILL FOR AN ACT ENTITLED: "AN ACT TO GIVE THOSE WHO ARE INJURED BY AN INTOXICATED PERSON A CAUSE OF ACTION AGAINST ANYONE WHO UNLAWFULLY FURNISHED THE INTOXICATED PERSON WITH ALCOHOLIC BEVERAGES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Liability for furnishing alcoholic beverages to intoxicated person. A person who suffers personal injury, property damage, or a loss of support proximately caused by the intoxication of another person or by such other person because of his intoxication has a cause of action against any third person who furnished or caused to be furnished alcoholic beverages to the intoxicated person in violation of 16-3-301(2)(b) or 16-6-304. The cause of action survives the death of the injured person, and the action may be brought by his representative. In any action brought under this section, the plaintiff may recover such damages as under all the circumstances of the case may be just, including exemplary damages.

91. House of Representatives Judiciary Committee Report, February 19, 1979.

92. H.B. 395, 49th Leg., (1985). On third reading the bill stated:

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT CERTAIN PURVEYORS OF ALCOHOLIC BEVERAGES ARE NOT LIABLE FOR INJURY OR DAMAGE CAUSED BY CONSUMERS AS A RESULT OF THE CONSUMPTION OF SUCH BEVERAGES."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Selling or giving alcoholic beverages—no LIMITATION OF civil liability for consumer's acts. No (1) EXCEPT AS PROVIDED IN SUBSECTION (2), NO person or entity that sells, serves, gives, or delivers alcoholic beverages as defined in 16-1-106, whether or not for profit, in any place, including but not limited to a person's residence, a bar, restaurant, private or nonprivate club or institution, or private or nonprivate business, professional, social, or other party or event, is liable to any person for injury or damage of any kind wholly or partly caused by the consumer's being under the influence of alcoholic beverages.

(2) SUBSECTION (1) DOES NOT APPLY TO ANY PERSON OR ENTITY THAT SELLS, SERVES, GIVES, OR DELIVERS ALCOHOLIC BEVERAGES TO A PERSON UNDER THE LEGAL DRINKING AGE IN VIOLATION OF 16-3-301, 16-6-305, OR 45-5-623.

(Upper case denotes material added by amendment.)

93. *Id.*

recommendation and refused to pass the bill.[94] Subsequent attempts to revive the bill failed.

2. *The Legislature's Response to Nehring v. Lacounte*

a. *Montana's Dramshop Act*

The notoriety of the Montana Supreme Court's decision in *Nehring* prompted a hasty legislative response.[95] Justice Morrison blamed inadequate reporting, poorly informed editorial comments, and propaganda dispensed by lobbyists for the Montana Tavern Owners Association for the misinformation publicly disseminated regarding the court's holding in *Nehring*.[96] Almost immediately the legislature joined in the confusion. Less than three months after *Nehring*, a special session of the Forty-Ninth Legislature attempted to clarify dramshop liability in Montana by providing criteria to govern the liability of purveyors of alcohol for injuries or damages caused by their consumers. The legislature's guidance took the following form:

> HOUSE BILL NO. 13
> A BILL FOR AN ACT ENTITLED: "AN ACT TO PROVIDE CRITERIA GOVERNING THE LIABILITY OF A PERSON OR ENTITY FURNISHING AN ALCOHOLIC BEVERAGE FOR INJURY OR DAMAGE ARISING FROM AN EVENT INVOLVING THE CONSUMER; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
>
> Section 1: Civil liability for injuries involving alcohol consumption. (1) The purpose of this section is to set statutory criteria governing the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage.
>
> (2) A person or entity that furnishes an alcoholic beverage may not be found liable for injury or damage arising from an event involving the consumer wholly or partially on the basis of a provision or a violation of a provision of Title 16.
>
> (3) Furnishing a person with an alcoholic beverage is not a cause of, or grounds for finding the furnishing person or entity liable for, injury or damage wholly or partly arising from an event involving the person who consumed the beverage unless:

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94. MONTANA LEGISLATIVE COUNCIL, FINAL REPORT ON STATUS OF HOUSE BILLS, 49th Leg., at 42 (April 26, 1985).

95. H.B. 13, 49th Leg., (1986 Mont. 1st Spec. Sess.).

96. *Bissett*, ___ Mont. at ___, 717 P.2d at 548 (Morrison, J., concurring and dissenting).

(a) the consumer was under the legal drinking age and the furnishing person knew that the consumer was underage or did not make a reasonable attempt to determine the consumer's age;

(b) the consumer was visibly intoxicated; or

(c) the furnishing person forced or coerced the consumption or told the consumer that the beverage contained no alcohol.

Section 2. Effective date. This act is effective on passage and approval.

b. *Dramshop Liability Under Montana's Dramshop Act*

The impact of Montana's Dramshop Act is unknown. However, each provision of the bill contains measures which merit particular attention. Notably, the first provision draws no distinction between commercial and social purveyors of alcoholic beverages.[97] Categorizing both tavern operators and social hosts together expands dramshop liability by adding social hosts to the list of potential defendants. However, this expansion by the legislature ignores relevant policy considerations which previously distinguished commercial purveyors from social purveyors of alcohol.

The second provision comprises the most direct response to *Nehring*. The court in *Nehring* based its decision largely on violations of the liquor control statutes. In fact, the court defined a tavern operator's duty in terms of compliance with the statutory prohibitions against serving intoxicated persons and minors.[98] Thus, the second provision negates the court's definition of duty by explicitly prohibiting the imposition of liability for violation of any provision of Montana's liquor control statutes.[99]

The third provision enumerates the situations in which commercial and social purveyors can be liable for injury or damage caused by a consumer.[100] Purveyors of alcohol have a duty under the third provision to refrain from serving consumers under the legal drinking age and consumers who are visibly intoxicated. A purveyor's duty also extends to situations in which the consumer is forced or coerced into consumption. A purveyor's duty, as defined by the legislature, closely parallels the duty the Montana Supreme Court defined in *Nehring*. The duties diverge significantly only at one point. The court imposed a more onerous burden on tavern operators by defining the duty in terms of the statutory prohibi-

97. H.B. 13, 49th Leg., (1986 Mont. 1st Spec. Sess.).
98. *See supra* notes 44-52 and accompanying text.
99. H.B. 13, 49th Leg., (1986 Mont. 1st Spec. Sess.).
100. *Id.*

tion on serving "intoxicated persons."[101] The legislature eased the burden on purveyors by demanding only that they refrain from serving "visibly intoxicated" consumers in order to avoid liability.[102]

III. Conclusion

In *Nehring*, the Montana Supreme Court abrogated the common law rule of tavern operator nonliability, and found that violation of Montana's liquor control statutes constituted evidence of negligence. The legislature cut short the ramifications of *Nehring* by providing separate criteria to govern the liability of purveyors of alcohol for injury or damage caused by the consumer of that alcohol. However, the wisdom of *Nehring* endures because, even though the legislature established the parameters of dramshop liability, the Montana Supreme Court will ultimately interpret and apply the controlling legislation. Furthermore, the unresolved issues which plagued the court's decision in *Nehring* survived the Legislature's attempt to refine dramshop liability.

Both the immediate impact of *Nehring* and the legislative response evinces the deterrent and loss distribution effects. Tavern operators must take steps to protect themselves from liability by educating their employees regarding the standards imposed by the dramshop act. A tavern operator can also attempt to protect himself financially by obtaining liability insurance. Additionally, social purveyors of alcoholic beverages are now on notice that they are potentially liable for injuries caused by one to whom they have furnished alcohol.

As they interpret the dramshop act, Montana courts must avoid creating a morass of arbitrary distinctions and categorizations upon which they either impose or deny liability. This important area of the law cannot be allowed to remain in a state of disarray. With the severity and number of alcohol-related injuries, courts must strive for clarity as they interpret the act. Lawyers attempting to anticipate how the Montana Supreme Court's interpretation of the dramshop act will affect implementation of civil liability must look to *Nehring* and *Bissett*. These cases provide lawyers with helpful insight into how the court might resolve the troublesome issues inherent in the expanding area of dramshop liability.

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101. *Nehring*, ___ Mont. at ___, 712 P.2d at 1334.
102. H.B. 13, 49th Leg., (1986 Mont. 1st Spec. Sess.).